

**STATE OF WISCONSIN**  
**Department of Commerce**

*In the Matter of the PECFA Appeal of*

Gary I. Boie,  
Pat Foley, and  
Velps Auto & RV Sales Inc  
4571 Crow Ct  
Green Bay WI 54313-9514

PECFA Claim #54303-6443-29  
Hearing #95-65

Final Decision

**PRELIMINARY RECITALS**

Pursuant to a petition for hearing filed April 21, 1995, under §101.02(6)(e), Wis. Stats., and §ILHR 41.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now the Department of Commerce (Department), upon a stipulation of facts (including the incorporation of exhibits) which were filed in June of 1997, together with the briefs of the parties filed in July and August 1997. A proposed decision was issued on June 28, 1999, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the Department sustained its burden of proving by clear and convincing evidence that its decision dated March 24, 1995, which disqualified the appellant's Petroleum Environmental Cleanup Fund Act (PECFA) reimbursement claim in the amount of \$76,580.36 based on s. 101.143 (4)(g) 2 Stats., on the basis of submission of a fraudulent claim, was correct.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

Gary I. Boie  
Velps Auto & RV Sales Inc  
4571 Crow Ct  
Green Bay WI 54313 -9514

By: Linda E. Benfield  
Foley & Lardner  
777 E Wisconsin Ave  
Milwaukee WI 53202-5367

Department of Commerce

PECFA Bureau  
201 West Washington Avenue  
PO Box 7838  
Madison WI 53707-7838

By: Kristiane Randal  
Department of Commerce  
201 W. Washington Ave., Rm 321A  
PO Box 7838  
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated May 12, 1999.

The matter now being ready for decision, I hereby issue the following

#### FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated June 28, 1999 are hereby adopted for purposes of this Final Decision.

#### CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated June 28, 1999 are hereby adopted for purposes of this Final Decision.

#### DISCUSSION

The Discussion in the Proposed Decision dated June 28, 1999 is hereby adopted for purposes of this Final Decision.

#### FINAL DECISION

The Proposed Decision dated June 28, 1999 is hereby adopted as the Final Decision of the Department.

## **NOTICE TO PARTIES**

### **Request for Rehearing**

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your I have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

### **Petition For Judicial Review**

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: July 26, 1999

Terry W. Grosenheider  
Executive Assistant  
Department of Commerce  
PO Box 7970  
Madison WI 53707-7970

copies to:

Gary I. Boie  
Velps Auto & RV Sales Inc  
4571 Crow Ct  
Green Bay WI 54313-9514

Joyce Howe, Office Manager  
UI Madison Hearing Office  
1801 Aberg Ave Suite A  
Madison WI 53707-7975

Kristiane Randal  
Department of Commerce  
201 W. Washington Ave., Rm. 3 2 1 A  
PO Box 7838  
Madison WI 53707-7838

Linda E. Benfield  
Foley & Lardner  
777 E Wisconsin Ave  
Milwaukee WI 53202-5367

Date Mailed: July 28, 1999

Mailed By:

**STATE OF WISCONSIN  
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for  
reimbursement under the PECFA  
Program by**

MADISON HEARING OFFICE  
1801 Aberg Ave., suite A  
P.O. Box 7975  
Madison, WI 53707-7975  
Telephone: (608)242-4818  
Fax: (608)242-4813

GARY BOIE, PAT FOLEY AND VELD AUTO & RV SALES, INC.

**Hearing Number- 95-65  
Re: PECFA Claim      54303-6443-29**

**PROPOSED HEARING OFFICER DECISION**

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. For this case send your objections and arguments to: Department of Commerce, Executive Assistant Terry Grosenheider, P.O. Box 7970; Madison, WI 53707-7970. The Administrative Law Judge has forwarded the hearing record to the office of the Secretary of the Department of Commerce to facilitate issuance of a final decision in a timely manner.

**STATE HEARING OFFICER:**  
Karen L. Godshall

**DATED AND MAILED:**  
June 28, 1999

**MAILED TO:**

**Appellant Agent or Attorney**

Linda E Benfield  
Foley & Lardner  
777 East Wisconsin Avenue  
Milwaukee, WI 53202-5367

**Department of Commerce**

Kristiane Randal  
Assistant Legal Counsel  
P.O. Box 7838  
Madison, WI 53707-7838

State of Wisconsin  
DEPARTMENT OF COMMERCE

In the matter of the  
Request for Reimbursement Pursuant  
To the Provisions of the PECFA Program

Hearing Number 95-65

PECFA Claim Number 54303-6443-29

Gary Boie & Pat Foley, dba Velp's Auto & RV Sales, Inc., Appellant

vs.

Wisconsin Department of Commerce

A decision was issued on or about March 23, 1995, by the Department of Industry, Labor and Human Relations, disqualifying the entire remaining amount of a PECFA claim filed by Gary Boie and Pat Foley, doing business as Velp's Auto & RV Sales, Inc., on the basis that the claim as submitted was fraudulent. The claimants appealed from that denial, and sought a hearing on the claim.

Administration of the PECFA Program was subsequently transferred to the newly-created Wisconsin Department of Commerce. The secretary of that department delegated administrative law judge Karen L. Godshall, of the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations) to hear the appeal, and to issue a proposed decision.

Prior to the holding of any hearing, the claimants by their attorney, and the Department of Commerce, by its assistant legal counsel, prepared a stipulation of facts to be used in lieu of evidence presented at hearing as a basis for resolution of the matter.

Based on the stipulation of facts (including the incorporated exhibits), and a variety of briefs from the parties submitted in calendar year 1997, a proposed decision was issued in May of 1998. That decision was adopted by the Department of Commerce as its final decision in November of 1998. The claimant then filed a petition for judicial review in Dane County Circuit Court. The Department of Commerce at that point stipulated to an order remanding the matter to the administrative law judge to issue a new decision applying the correct standard of proof (clear and convincing evidence), which was described by the court in its order in a related case (Lon Neuville vs. Department of Commerce). The department once again delegated administrative law judge Karen L. Godshall to issue a proposed decision, and delegated the executive assistant of the department to issue a final decision.

The parties have now had an opportunity to submit further briefs in the matter, and those briefs were received on June 1, 1999. The matter is now again ripe for decision.

Based on the previous stipulation of facts, and the briefs submitted prior to the earlier decisions, together with the June 11, 1999 briefs, the state hearing officer now makes the following

### PROPOSED SUMMARY OF FACTS

(NOTE: The following summary of facts does not replace the stipulation of facts, which is adopted by the state hearing officer and incorporated by reference herein. The following is merely a brief summary of the background of the case, added to facilitate later discussion of the issues. The summary is taken from the prior proposed decision.)

The appellants Gary Boie and Pat Foley were the owners of a business known as Velp's Auto & RV Sales, Inc., located in Green Bay, Wisconsin. The business involved sales of used motor vehicles and vehicle rentals. In 1990, they learned that underground storage tanks located on their business premises need to be removed and the site cleaned of any contamination which might be discovered. They eventually contracted with Creative Home Builders and Excavating for removal of the tanks, and with GCME Consultants for related environmental consultation, and the tank removal began.

In the process of tank removal, soil contamination was discovered and Boie (as representative of the business and of the landowner) was advised of the need to clean the site. In early 1991, the site evaluation and related work began, with the excavation at the site remaining open until early March 1991. The appellants then went to an area financial institution to seek a loan to cover the costs of the work on the site. They also filed a claim under the PECFA program for reimbursement of their costs. At the time of the loan closing, Boie wrote a check for \$5000 from the business account to cover the standard deductible amount under the PECFA program and assigned the PECFA proceeds to the financial institution to cover the loan amount.

On the same date as the loan closing, Pat LeSage of Creative Home Builders and Excavating gave Boie \$5000 in cash, which Boie deposited into the business account, characterizing it as a "shareholder loan". The purpose of that payment from LeSage to Boie, from Boie's point of view, was to provide partial reimbursement for the business losses during the period of the site work, which had been longer than originally estimated. The effect of the payment was to essentially remove the requirement of the \$5000 deductible payment, so that the PECFA program paid to the appellants their entire out-of-pocket costs for the remediation. At that point in time, there were no rules which made it illegal for a consultant or contractor to reimburse a site owner for its deductible costs.

The PECFA claim paperwork was later prepared by or under the supervision of LeSage and submitted to the PECFA program by the appellants. The claim, as submitted, contained excessive claims for reimbursement, which were known to be fraudulent by LeSage, but of which the appellants had no actual knowledge. The fraudulent portion of the claim was somewhat in excess of \$20,000 (out of a total claim of approximately \$97,000). The difference related primarily to landfill costs.

Boie was later involved in a John Doe proceeding with regard to the business activities of LeSage et al. Because of his testimony on that matter, in which he denied that LeSage had reimbursed the \$5000 deductible amount, he was charged with false swearing and later entered into a plea agreement concerning that charge.

## PROPOSED ISSUE STATEMENT

Did the department sustain its burden of proving by clear and convincing evidence that its decision dated March 24, 1995, which disqualified the appellants Petroleum Environmental Cleanup Fund Act (PECFA) reimbursement claim in the amount of \$76,580.36 based on § 10 1. 143 (4)(g)2, Stats., on the basis of submission of a fraudulent claim, was correct?

## PROPOSED DISCUSSION AND CONCLUSIONS

The burden is upon the department to establish by clear and convincing evidence that payment should be denied to the claimants on the basis that they submitted a "fraudulent claim". The phrase "fraudulent claim" is not defined in the PECFA program statutes or rules. However, it is clear that in order for there to be submission of a fraudulent claim, several factors must be shown. First, it must be clear that the claimants submitted the claim, and that it included fraudulent elements, such as overcharges. Those factors are not in dispute here. It must also be shown that the claimants knew that the claim was fraudulent or that they submitted the claim with reckless disregard as to whether it was fraudulent. This is not necessarily equivalent to finding that there was a specific intent to defraud.

Since the stipulated facts make clear that the claimants did not affirmatively know that the claim being submitted was fraudulent, the question is then whether they acted with reckless disregard of the possibility of fraud inherent in the claim. Again, that issue must be resolved in large part by looking to the stipulated facts. Those facts, insofar as they relate to the claimants' dealings with Paters and/or LeSage, clearly establish that they knew that the transaction involving the deductible needed to be concealed. The transfer of cash, the need to mischaracterize the source of the cash when it was deposited into their account, and the very fact that the entire transaction was a wash—that is, that the claimants were to receive cash in the same amount as a check which they were to write—put them on notice that the intent of Paters-5 and/or LeSage was to somehow subvert the PECFA program requirements for their own financial gain. This knowledge of the problems inherent in the transaction manifested itself in Boie's later denials that the transaction had taken place. His involvement in the above transaction convincingly establishes that he, as agent for the business and for the landowner, was willing to take whatever actions were necessary, and to engage in whatever subterfuge might be called for, in order to avoid paying his requisite share of the cleanup costs. Based on that, he must be held to have known that Paters and LeSage would then undertake some plan by which they could be made whole and under which they would not have to actually cover the deductible costs which were the claimants' original responsibility. Despite that knowledge, the claimants made no significant effort to monitor or assess whether the claim, as prepared by Paters and LeSage, was accurate or not, even though they did question aspects of the claims submitted by the other contractor. Their failure to do so, in view of the all the attendant circumstances, made them willing participants in the attempt to defraud the PECFA program. The stipulated facts, and the inferences which must be drawn from them, clearly and convincingly establish that the claimants acted in reckless disregard of their obligations under the PECFA program and in so doing, submitted a fraudulent claim.

The state hearing officer therefore finds that Gary Boie and Pat Foley, doing business as Velp Auto & RV Sales, Inc., submitted a fraudulent claim to the PECFA program, within the meaning of § 101.143 (4)(g)2 of the statutes.

## PROPOSED DECISION



The department's decision, dated March 24, 1995, to disqualify the above Petroleum Environmental Cleanup Act Fund (PECFA) claim was correct and is affirmed.

By

Karen L. Godshall

State Hearing Officer

Dated and mailed this 28th day of June, 1999